Resistflame Acquisition Company Inc. f/k/a Resistflame Kiesling & Hess Finishing Company and UNITE HERE!, Philadelphia Joint Board, AFL—CIO, CLC. Case 4–CA–36334

March 6, 2009

# **DECISION AND ORDER**

# BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charges filed by the Union on September 11, October 3 and 15, 2008, respectively, the General Counsel issued the complaint on December 9, 2008, against Resistflame Acquisition Company, Inc., f/k/a Resistflame Kiesling & Hess Finishing Company, the Respondent, alleging that it had violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On January 15, 2009, the General Counsel filed a Motion for Default Judgment with the Board. On January 21, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

# Ruling on Motion for Default Judgment<sup>1</sup>

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that the answer must be received by the Regional Office on or before December 23, 2008, and that, if no answer was filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated December 23, 2008, notified the Respondent that unless an answer was received by December 30, 2008, a motion for default judgment would be filed. On December 29, 2008, because it was unclear whether the Respondent had been served with the complaint, a second letter was sent notifying the Respondent that if an answer was filed by January 12, 2009, a motion for default judgment would not be filed.<sup>2</sup> This letter included a copy of the complaint and notice of hearing and the portions of the Board's Rules concerning the filing of an answer. The Respondent neither filed an answer to the complaint nor requested an extension of time to do so.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, an Ohio corporation with an office and shop in Philadelphia, Pennsylvania (the Philadelphia facility), has been engaged in the business of textile finishing.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, purchased and received at the Philadelphia facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that, at all material times, UNITE HERE!, Philadelphia Joint Board, AFL—CIO, CLC, the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

# II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Thomas Applegate—President and Chief Executive Officer

Timothy Redmond—General Manager

The following employees of the Respondent, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

<sup>&</sup>lt;sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>2</sup> The motion for default judgment refers to the second letter as having been sent on December 30, 2009. However, the letter, which is attached to the motion as Exh. 11, is dated December 29, 2009. Overnight mail receipts, showing service of the letter on December 29, 2008 and indicating that a signature was required for delivery, are attached to the motion as Exh. 13. There is no indication that delivery was unsuccessful.

All production employees at the Philadelphia facility, excluding clerical and office employees, executives, supervisors, administrative, professional, confidential employees and guards, as defined in the Act.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements. The most recent of these agreements (the agreement) was effective by its terms from June 1, 2005, through May 31, 2008, and its terms and conditions of employment have been adopted by the Respondent.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

From about April 22 to about July 22, 2008, the Respondent and the Union met for the purposes of collective bargaining with respect to the wages, hours, and other terms and conditions of employment of the unit.

About June 19, 2008, the Union verbally requested that the Respondent furnish the Union with the details of health plans the Respondent claimed to be considering proposing for the unit.

About July 18, 2008, in a meeting with the Respondent, the Union verbally requested that the Respondent furnish the Union with the details of "different" health plans the Respondent claimed to be considering proposing for the unit.

About July 22, 2008, the Union, by telephone, reiterated its request for all information pertaining to health plans the Respondent claimed to be considering proposing for the unit, including copies of the plans and the costs to be borne by unit employees.

The Union reiterated its requests for the information referred to above, verbally on about September 25, 2008, orally, and by e-mail to Thomas Applegate on about August 7, 15, 18, and 25, 2008.

The information requested by the Union, as described above, is necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the unit.

During the period of collective bargaining described above, the Respondent engaged in the following conduct:

(1) From about June 19 until about August 18, 2008, failed to furnish the Union with the requested information referred to above, except for the costs to be borne by unit employees under the health plans the Respondent claimed to be considering proposing to the Union, which costs the Respondent has failed to furnish to the Union since about June 19, 2008.

- (2) During the following periods of time, failed to meet at reasonable times at the request of the Union for the purpose of reaching a successor collective-bargaining agreement: from May 9–June 19, 2008; from June 30–July 18, 2008; and after July 18, 2008.
- (3) Since about July 18, 2008, failed and refused to respond to the Union's health-insurance proposals and to provide the Union with a counterproposal on this issue.
- (4) Since about March 2008, has failed and refused to remit required contributions to the Welfare and Security Fund on behalf of unit employees, as required by the agreement.
- (5) From about March 12 until about May 31, 2008, failed to remit checked off dues to the Union, pursuant to the dues-checkoff provision in article 23 of the agreement, although the Respondent deducted the dues from unit employees' wages.
- (6) Since about June 1, 2008, after the expiration of the agreement, has failed and refused to remit dues deducted from the wages of unit employees to the Union.

The subjects set forth above in paragraphs (4) and (5) relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above in paragraphs (4) and (5) without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct, and prior to May 31, 2008, without the Union's consent.

# CONCLUSIONS OF LAW

- 1. By the acts and conduct described above in paragraphs (1) through (5), the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the
- 2. By the conduct described above in paragraph (6), the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.<sup>3</sup>

<sup>&</sup>lt;sup>3</sup> In Chairman Liebman's view, dues-checkoff provisions, like other contractually established terms and conditions of employment, survive the expiration of an agreement and continue until the parties reach a new agreement or a valid impasse. See her dissenting opinion in *Hacienda Resort Hotel & Casino*, 351 NLRB 504 (2007), revd. sub nom. *Local Joint Executive Bd. v. NLRB*, 540 F.3d 1072 (9th Cir. 2008). Pursuant to that view, she normally would find that the Respondent's post-expiration failure to remit dues violated Sec. 8(a)(5). For institutional reasons, however, she agrees to apply the extant precedent in *Hacienda* and find only a violation of Sec. 8(a)(1).

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to provide to the Union information pertaining to the costs to be borne by unit employees under the health plans the Respondent claimed to be considering proposing, we shall specifically order the Respondent to provide that information.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing since about July 18, 2008, to meet at reasonable times and bargain with the Union for the purpose of reaching a successor collective-bargaining agreement and by failing to respond to the Union's health insurance proposals, we shall order the Respondent, on request, to meet and bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit, and, if an understanding is reached, to embody the understanding in a signed agreement.

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing to remit contributions to the Welfare and Security Fund on behalf of unit employees since March 2008, as required by the collectivebargaining agreement, we shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions on behalf of unit employees that have not been made since that date, including any additional amounts due the funds in accordance with Merryweather Optical Co., 240 NLRB 1213, 1216 fn. 7 (1979).<sup>4</sup> We shall also order the Respondent to reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed with interest as interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

Having found that the Respondent has violated Section 8(a)(5) and (1) by failing, from about March 12 until about May 31, 2008, to remit to the Union the dues that were deducted from employees' wages, as required by

article 23 of the collective-bargaining agreement, we shall order the Respondent to forward the deducted dues to the Union as required by the agreement, with interest, as prescribed in *New Horizons for the Retarded*, supra. In addition, having found that the Respondent has violated Section 8(a)(1) by retaining for itself dues deducted from the pay of unit employees after the expiration of the collective-bargaining agreement, the Respondent shall be ordered to remit those sums to the Union, provided that the dues were deducted pursuant to valid, unexpired, and unrevoked dues-checkoff authorizations. If the dues were deducted pursuant to checkoff authorizations which had expired or were revoked, the Respondent shall return the withheld dues to the employees, with interest as prescribed in *New Horizons for the Retarded*, supra.

## **ORDER**

The National Labor Relations Board orders that the Respondent, Resistflame Acquisition Company, Inc. f/k/a Resistflame Kiesling & Hess Finishing Company, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain collectively and in good faith with UNITE HERE!, Philadelphia Joint Board, AFL-CIO, CLC, as the exclusive collective-bargaining representative of the following unit:
  - All production employees at the Philadelphia facility, excluding clerical and office employees, executives, supervisors, administrative, professional, confidential employees and guards, as defined in the Act.
- (b) Refusing to furnish, and delaying in furnishing, requested information that is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.
- (c) Failing and refusing to remit contributions to the Welfare and Security Fund on behalf of unit employees, as required by the collective-bargaining agreement.
- (d) Failing and refusing to remit to the Union dues checked off pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement.
- (e) Failing to remit to the Union dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' valid, unexpired, and unrevoked checkoff authorizations, or failing to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' checkoff authorizations which had expired or been revoked.

<sup>&</sup>lt;sup>4</sup> To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions to the funds during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the funds.

- (f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the employees with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.
- (b) Promptly provide the Union with information pertaining to the costs to be borne by unit employees under the health plans that it claimed to be considering proposing during collective bargaining.
- (c) Make all delinquent Welfare and Security Fund contributions on behalf of the unit employees that have not been paid since March 2008, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.
- (d) Make unit employees whole for any expenses ensuing from the Respondent's failure to make the required Welfare and Security Fund contributions, with interest, in the manner set forth in the remedy section of this decision.
- (e) Remit to the Union all dues it deducted from employees' pay pursuant to valid dues-checkoff authorizations prior to the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.
- (f) Remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, all dues it deducted from employees' pay after the expiration of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.
- (g) Within 14 days after service by the Region, post at its facilities in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the

event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with UNITE HERE!, Philadelphia Joint Board, AFL-CIO, CLC, as the exclusive collective-bargaining representative of the employees in the following unit:

All production employees at our Philadelphia facility, excluding clerical and office employees, executives, supervisors, administrative, professional, confidential employees and guards, as defined in the Act.

WE WILL NOT refuse to furnish, or delay in furnishing, information that is necessary for and relevant to the performance of the Union's role as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT fail and refuse to remit contributions to the Welfare and Security Fund on behalf of unit employees, as required by the collective-bargaining agreement.

WE WILL NOT fail and refuse to remit to the Union dues we deducted pursuant to valid checkoff authorizations prior to the expiration of the collective-bargaining agreement.

WE WILL NOT fail to remit to the Union dues checked off after the expiration of the collective-bargaining

<sup>&</sup>lt;sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agreement, if the dues were deducted pursuant to the employees' valid, unexpired, and unrevoked checkoff authorizations, or fail to return to the employees dues checked off after the expiration of the collective-bargaining agreement, if the dues were deducted pursuant to employees' checkoff authorizations which had expired or been revoked.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL promptly furnish to the Union information pertaining to the costs to be borne by employees under

the health plans that we considered proposing during collective bargaining.

WE WILL make all delinquent Welfare and Security Fund contributions on behalf of the unit employees that have not been paid since March 2008, including any additional amounts due the funds.

WE WILL make unit employees whole for any expenses ensuing from our failure to make the required Welfare and Security Fund contributions, with interest.

WE WILL remit to the Union all dues we deducted from the employees' pay pursuant to valid dues-checkoff authorizations prior to the expiration of the collectivebargaining agreement, with interest.

WE WILL remit to the Union, or to the employees, as determined at the compliance stage of this proceeding, all dues we deducted from employees' pay after the expiration of the collective-bargaining agreement, with interest.

RESISTFLAME ACQUISITION CO. F/K/A RESISTFLAME KIESLING & HESS FINISHING CO.